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This is the fourth in our series of **contract disputes** practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

CONTRACT DISPUTES PRACTICAL GUIDES

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HOW FAR CAN YOU ACT IN YOUR OWN SELF-INTEREST?

THE ROLE OF GOOD FAITH IN COMMERCIAL CONTRACTS

The traditional starting point in English contract law is that parties are free to do what they like so long as they do not breach the agreed terms.

But it is becoming increasingly common for parties to agree terms requiring them to act in “good faith”, or similar. Even where no such term is expressed in the contract, courts and tribunals are increasingly being asked to imply good faith obligations.

As a result, commercial parties may be uncertain what is required of them.



Chris Parker, Gregg Rowan and **Nick Pantlin** consider the circumstances in which parties may owe one another duties of good faith, what those duties may involve, and some practical steps that can be taken to minimise the risks.

TOP TIPS TO NAVIGATE GOOD FAITH OBLIGATIONS:

- If there is an express obligation of good faith, **DON'T** ignore it – you will need to consider carefully what it requires
- **DON'T** assume that because the contract doesn't mention good faith, you're under no such obligation
- Since a good faith obligation may be implied, **DO** consider whether it is preferable to address the matter expressly
- If you agree a good faith obligation, **DO** consider specifying the actions that are (and are not) required to satisfy it
- **DO** consider excluding any obligation of good faith save as specifically set out in the agreement
- If you want an enforceable obligation to negotiate, **DO** include time limits / objective criteria
- **DO** remember good faith may be relevant if negotiating contracts in an international context

1. GENERAL PRINCIPLES

English law does not impose a general duty of good faith on contracting parties either in negotiating or in performing the contract. This is in contrast to many other legal systems. An obligation of good faith is recognised in most civil law jurisdictions (such as France and Germany) and in a number of other common law jurisdictions including the US, Canada and Australia.

Obligations of good faith can, however, come into play under English law in various circumstances. English law does imply obligations of good faith as a matter of course in certain types of contract, because of the nature of the relationship. Some obvious examples are contracts of agency, partnership and employment. These are not considered further in this guide.

Concepts of good faith may also be introduced by statute, particularly those deriving from EU law. A good example is section 62 of the Consumer Rights Act 2015, which implements a 1993 Directive on unfair terms in consumer contracts. Section 62 defines a term in a consumer contract as unfair if, "contrary to the requirement of good faith", it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

Parties may include express obligations of good faith in their contracts, which the courts will then have to interpret – see section 4 below. Or in some circumstances the courts may imply obligations of good faith into commercial contracts, applying ordinary principles governing the implication of contractual terms – see sections 5-7 below.

Particular considerations arise in the context of express obligations to negotiate in good faith – see section 8 below.

2. NO GENERAL DUTY

As noted above, there is no generally applicable duty of good faith in English contract law. This long-standing principle was revisited by the High Court in a much-discussed decision in 2013, *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) (see this [post](#) on our Litigation Notes blog).

The judge referred to a number of reasons for the “traditional English hostility” towards a doctrine of good faith: the tendency for English law to develop particular solutions in response to particular problems rather than enforcing broad overarching principles; the view that parties should be free to act as they wish so long as they do not act in breach of contract; and the concern that recognising a general requirement of good faith would create uncertainty.

“The starting point in English contract law is that parties are free to pursue their own self-interests, so long as they do not act in breach of contract. But that is not always the end point, so caution is needed.”

He expressed the view that the resistance to a generally applicable duty of good faith is “misplaced” and that English law is “swimming against the tide” in this regard. However, he doubted that English law was ready to recognise a requirement of good faith implied by law into all commercial contracts, even as a default rule. Instead he suggested that good faith obligations may be implied into commercial contracts based on the presumed intention of the parties. This is considered in section 5 below.

3. MEANING OF GOOD FAITH?

Because there is no universally accepted definition of good faith under English law, there is scope for argument about what an obligation of good faith actually involves, absent a clear contractual definition.

In general, a duty of good faith, whether express or implied, will not require a party entirely to subvert its own commercial interests to those of the counterparty, or to give up its express contractual rights. Beyond that, however, the content of the duty varies, depending on the particular contract and the surrounding context.

It is often said that the core of the duty of good faith is honesty. But as the judge in *Yam Seng* commented, even the core value of honesty is sensitive to context. It is invariably dishonest to deceive another person, with the intention that they rely on the false statement, but sometimes the requirements of honesty go further than that.

Depending on context, the judge noted, it may be dishonest to fail to correct a statement that is discovered to be false, or to be deliberately evasive. A duty of honesty may even extend, he said, to an expectation that the parties will share relevant information, so that a deliberate omission to do so may amount to bad faith, particularly in a long-term, “relational” contract (see section 6 below). The judge rejected as “too simplistic” the traditional dichotomy between fiduciary relationships, which involve duties of disclosure, and other contractual relationships in which no such duty is supposed to operate.

“The term ‘good faith’ is often referred to, but less often defined. It can be difficult to know exactly what is meant by the term in any given situation.”

The duty of good faith is often said to include other generally accepted standards of commercial dealing – ie avoiding conduct which might be described as “improper”, “commercially unacceptable” or “unconscionable”, even if it is not actually dishonest. This has been referred to as a requirement of fair dealing, or integrity, or similar.

The other main aspect that is often cited is fidelity to the parties’ bargain, or the agreed common purpose, or the justified expectations of the parties.

These concepts are not easy to pin down, particularly around the edges, and there is clearly scope to debate whether a particular duty of good faith includes one or more of them. As a result, even where a duty of good faith is established, whether particular conduct is or is not in breach of that duty is typically a hotly disputed question.

The upshot is that the meaning of good faith can best be explored by reference to particular cases, including those discussed in this guide.



4. EXPRESS OBLIGATIONS

A contract may, of course, include an express term requiring one or more parties to act in good faith, either generally in performing the agreement or in relation to particular matters.

Where an express term has been included, the court will need to interpret it to determine the scope and content of the obligation. The usual principles of contractual interpretation apply (see [issue 2 of this series](#) of contract disputes practical guides). The court's aim is to determine the meaning the contract would convey to a reasonable person with all the background knowledge available to the parties at the time the contract was made. As well as the words used and the relevant background, the court will take into account how the clause fits within the contract as a whole and considerations of commercial common sense.

The general trend in the case law seems to be in favour of giving a narrow interpretation to express contractual obligations of good faith. In addition, where a contract contains express obligations of good faith, the courts will tend to hesitate before implying further such obligations.

Where an express obligation of good faith is included in a contract, it is advisable to clarify both the scope and, if possible, the content of that obligation rather than leaving it for the courts to determine.

“Parties should think carefully before including a general, and potentially open-ended, obligation of good faith in their contracts. Parties may wish to consider additional terms defining the nature and extent of the obligation.”

In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, the Court of Appeal had to interpret an express obligation of good faith in a contract to provide hospital catering and cleaning services over a seven year period. The relevant term provided that the parties:

“will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust ... to derive the full benefit of the Contract.”

The court held that the obligation to co-operate in good faith was not a general one which qualified or reinforced all of the parties' obligations in all situations where they interacted. It was, the court said, specifically focused on the two purposes identified.

The good faith obligation did not, therefore, apply to the Trust's powers to make deductions from monthly payments and award “service failure points” where the contractor failed to meet detailed service specifications. These powers were irrelevant to the two purposes identified in the clause. The Trust's excessive deductions did not therefore constitute a breach of the clause.

The Court of Appeal also commented that, where a contract makes specific provision for particular eventualities, care must be taken not to construe a general and potentially open-ended obligation to “co-operate” or “act in good faith” as covering the same ground, which risks cutting across those more specific provisions and any limitations in them.

In *TSG Building Services PLC v South Anglia Housing Limited* [2013] EWHC 1151 (TCC) (see this [post](#) on our Litigation Notes blog) TSG contracted to provide a gas servicing and associated works programme to the housing stock of SAHL. The contract provided:

“The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities ... and in all matters governed by the Partnering Contract they shall act reasonably and without delay.”

A separate clause gave SAHL the right to terminate for convenience. A little over a year into the contract term, SAHL served a termination notice on TSG, without any explanation as to why it wished to terminate.

The court held that the obligations to co-operate and act reasonably related only to the provision of gas-related works. The parties had expressly limited the scope of these obligations to their “roles, expertise and responsibilities”, so they did not apply to the right to terminate.

The court also refused to imply a term to this effect. The parties had already gone as far as they wanted in expressing terms about how they were to work together. Even if there was some implied term of good faith, it could not circumscribe what the parties had expressly agreed, which was a right to terminate at any time for no, good or bad reason.

Gold Group Properties Ltd v BDW Trading Ltd [2010] EWHC 1632 (TCC) concerned a property development agreement for a site in Surrey. The contract set out how the net revenue generated by sales of the properties would be apportioned between the parties. It also contained a separate obligation on both parties to act in good faith.

By autumn 2008, the credit crisis was having a significant impact on property prices. The developer proposed to put the development on hold until the market recovered, or alternatively to agree revisions to the revenue sharing structure under the agreement. The freeholder rejected these proposals. Ultimately the agreement was terminated.

The High Court considered whether the freeholder was in breach of the good faith obligation by refusing to contemplate a change to the revenue sharing provisions which would have meant it taking a “hit” of about £2.8 million. It concluded there was no breach. The court noted that “good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.”

“A good faith obligation will only go so far. Ordinarily, at least, it will not mean a party having to give up its express rights under the contract.”

5. IMPLIED OBLIGATIONS

In *Yam Seng* (referred to above), the High Court took what is arguably a novel approach in implying a duty of good faith into an ordinary commercial contract, purporting to apply normal principles governing contractual interpretation and the implication of terms.

The judge referred to the two traditional criteria for implying a term into a contract, namely whether the term is: (i) so obvious that it goes without saying; or (ii) necessary to give business efficacy to the contract. He also referred to the Privy Council decision in *Attorney General for Belize v Belize Telecom Ltd* [2009] UKPC 10 (considered in [issue 2 of this series](#) of contract disputes practical guides) which was, at that time, generally seen as the leading modern authority on implied terms – though its authority has since been doubted, and the traditional approach reaffirmed, by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72 (see our [post](#) on that decision).

In *Belize Telecom*, Lord Hoffmann said that the two traditional tests for implication of terms could be analysed as part of the exercise of construction of the contract: what would the contract, read as a whole against the relevant background, reasonably be understood to mean? In *Yam Seng*, the judge pointed out that the relevant background includes not only matters of fact known to the parties but also “shared values and norms of behaviour”, which (he said) are taken for granted by the parties when making any contract without being spelt out in the agreement itself.

He then identified two overlapping “shared values and norms of behaviour” which informed interpretation of the contract:

- An expectation of honesty and the observance of other generally accepted standards of commercial dealing, ie avoiding conduct which might be described as (for example) “improper”, “commercially unacceptable” or “unconscionable”.
- Fidelity to the parties’ bargain, so that the contract must be given a reasonable construction which promotes the values and purposes expressed or implicit in it.

As noted above, since the decision in *Yam Seng*, the Supreme Court in *M&S* has emphasised that *Belize Telecom* should not be taken as having watered down the traditional, highly restrictive approach to the implication of terms. It is clear from the *M&S* decision that a term can only be implied if a reasonable reader would consider it so obvious as to go without saying, or necessary for business efficacy.

Where does that leave the approach in *Yam Seng*? It might be argued that since the judge’s analysis starts from the (arguably) broader *Belize Telecom* approach of the reasonable reader, it is undermined by the *M&S* decision. In *Yam Seng*, however, the judge stated that the same conclusion also follows if the traditional tests for the implication of a term are used, so the position is not clear.

It is also not clear to what extent *Yam Seng* seeks to establish the general proposition that a duty of good faith should be implied into all commercial contracts, as opposed to particular types of contract. In the *Mid Essex* case (referred to above), the Court of Appeal noted that there is no general doctrine of good faith in English contract law, citing *Yam Seng* for its discussion of good faith duties that are implied into certain categories of contract.

In *Yam Seng* (referred to above), ITC granted Yam Seng the exclusive rights to distribute certain fragrances in specified territories for approximately one year (later extended for a further eight months). After some 14 months, Yam Seng informed ITC it was terminating the agreement on the basis of ITC's alleged breaches.

The High Court (Leggatt J) held that ITC was in repudiatory breach of an express term, so Yam Seng was entitled to terminate on that basis. However, he went on to consider whether a duty of good faith should be implied into the contract. Interpreting the contract against the relevant background, including the "shared values and norms of behaviour" referred to above, he concluded that it should.

This case involved a distributorship agreement which, the judge said, required the parties to communicate effectively and cooperate in its performance. Yam Seng was arguably entitled to expect that it would be kept informed of ITC's best estimates of when products would be available, and any material changes. However, as Yam Seng's case was not advanced in that way, it was not necessary to decide whether, in this case, good faith included positive obligations of disclosure.

Instead, the court found that the content of the duty was captured by two more specific terms which Yam Seng contended should be implied, namely: (i) not knowingly to provide false information; and (ii) not to authorise sales of products that would undercut the prices specified in the agreement.

6. RELATIONAL CONTRACTS

The decision in *Yam Seng* suggests that duties of good faith are more likely to be implied into so-called "relational" contracts – described as contracts which involve a longer term relationship between the parties in which they make a substantial commitment.

The judge in *Yam Seng* said that such contracts may require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and involve expectations of loyalty which are not included in the express terms of the contract but are "implicit in the parties' understanding and necessary to give business efficacy to the arrangements". The examples he gave of such relational contracts were joint venture agreements, franchise agreements and (as in *Yam Seng* itself) long term distributorship agreements.

A number of subsequent decisions have followed this approach in implying good faith obligations into contracts the court described as "relational", even though they did not fall squarely within the categories mentioned in *Yam Seng*.

The question of whether or not a contract is "relational" in this sense is obviously a rather loose concept; many contracts could potentially fall into this category, depending on where the boundaries are drawn. It is therefore difficult to predict the precise circumstances in which a duty of good faith is likely to be implied on this basis.

"Good faith obligations are more likely to be implied in relatively long term contracts where the parties make a substantial commitment, as opposed to one-off dealings – though the distinction is not clear-cut."

In *Bristol Groundschool Limited v Whittingham* [2014] EWHC 2145 (Ch) (see [post](#)), the High Court implied a duty of good faith into a long-term contract relating to the development of computer-based training materials, following the analysis in *Yam Seng*.

For approximately 10 years, the claimant (BGS) and one of the defendants (IDC) collaborated in producing electronic training manuals for commercial airline pilots. IDC created the artwork for the manuals. BGS provided the text, sold the manuals to students, and paid a specified sum to IDC for each manual sold. Ultimately they fell out and BGS claimed that IDC breached the agreement by failing to provide technical support and refusing to include new materials in the manuals. IDC counterclaimed, alleging that BGS had breached an implied duty of good faith by downloading materials from IDC's IT systems without authorisation.

Although the agreement in the present case did not fall squarely within the categories identified in *Yam Seng* – counsel for the defendant described it as a “hybrid” between a joint venture and product distribution agreement – the deputy judge found that it was a “relational” contract of the kind referred to in that case, and that it contained an implied duty of good faith.

Good faith extended beyond, but at the very least included, the requirement of honesty. The relevant test was whether the conduct in question would be regarded as “commercially unacceptable” by reasonable and honest people in the particular context involved. The court concluded that BGS’s unauthorised downloading of material was commercially unacceptable and therefore BGS was in breach of the implied duty of good faith.

In *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) (see [post](#)) the High Court implied a duty of honesty and integrity into a contract to recover vehicles for a police authority, again following the analysis in *Yam Seng*.

The dispute centred on one vehicle which the police authority had instructed the contractor to send for crushing. The contractor reported that this had been done, but it was later discovered that the vehicle had instead been incorporated into the contractor’s fleet following a body swap with another vehicle. D&G’s explanation, which was accepted by the court, was that the body swap had been undertaken as a training exercise for its apprentices. However, the court held that the contractor was in breach of an implied term to act with integrity.

The existence of an implied term to act with honesty and integrity was (unusually) accepted by both parties, but the judge set out his view as to the proper legal basis for implying the term. The judge said he was using the term “integrity” to capture the requirements of fair dealing and transparency “which are no doubt required (and would, to the parties, go without saying)” in a contract of this sort.

The judge described the contract as a “relational contract par excellence”, as it was for a relatively long period (initially five years) and would involve a very large number of individual transactions. The implied term was also justified by the nature of the contract, which involved dealing with recovered property of members of the public on behalf of a law enforcement agency.

7. CONTRACTUAL DISCRETIONS

A good faith obligation may also be implied where a commercial contract confers a discretion on one party to make a decision that affects the interests of both. The precise formulation of the duty differs between cases, but the essence seems to be a requirement to exercise the discretion honestly and in good faith, and not to act in an arbitrary, capricious or irrational manner.

This principle was discussed recently by the Supreme Court in *Braganza v BP Shipping Limited* [2015] UKSC 17. The court commented that a party who is charged with making decisions which affect the rights of both parties has a clear conflict of interest. To ensure that such contractual powers are not abused, the courts have implied a term as to the manner in which such powers may be exercised.

In this context, a number of authorities distinguish between two sorts of contractual discretion. The first involves one party making an assessment or choosing from a range of options. The second simply permits one party to decide whether or not to exercise an absolute contractual right. It seems that in the first case, but not the second, a duty of good faith is likely to be implied – though of course the distinction is not always clear cut, and there may be room for debate as to which category a particular contractual discretion falls into.

To avoid this uncertainty, the prudent course is to address this issue specifically, either by including very clear words to exclude such a duty or by carefully defining the scope of the duty.

“Just because the contract gives one party the power to make a decision, that doesn’t mean its discretion is completely unfettered. The court may impose limits on how it must be exercised.”

The extent to which a duty of good faith will be implied to regulate the exercise of a contractual discretion was also considered by the Court of Appeal in the *Mid Essex* case (referred to above).

As noted above, the case concerned a contract to provide hospital catering and cleaning services over a seven year period. The contract set out detailed service specifications and provided that, where the relevant standards were not met, the Trust would be entitled to make deductions from monthly payments and award “service failure points” which could ultimately give the Trust the right to terminate the contract.

The Trust assessed the contractor’s performance on what the Court of Appeal described as an “extremely harsh” basis. It made some assessments which were “absurd”, such as awarding huge numbers of service failure points for out of date chocolate mousse and tomato ketchup.

In the High Court’s judgment, there was an implied term that, in exercising its power under the relevant clause, the Trust would not act in an arbitrary, capricious or irrational manner.

The Court of Appeal overturned that finding. The contract contained precise rules for determining how many service failure points the contractor had incurred. Determining the correct number was a matter of calculation, not discretion. The Trust’s only discretion was whether or not to award those service failure points. That was simply a matter of deciding whether or not to exercise an absolute contractual right, and there was no justification for implying a term to regulate the operation of the clause.

A similar approach was followed in *Myers v Kestrel Acquisitions Ltd* [2015] EWHC 916 (Ch) (see [post](#)). The case involved two categories of loan notes, including one category (VLNs) issued to the claimants. The instrument creating the VLNs allowed the first defendant to “make any modification” to the instrument unilaterally, as long as this was consistent with any modifications to the other category of loan notes.

Various modifications were made, with the effect that the repayment dates of the VLNs were postponed and they were subordinated to newly issued loan notes.

The claimants argued that the right to amend was subject to an implied term that the amendments had to be made in good faith and for the benefit of the holders of the two categories of loan notes as a whole.

The court held that no duty of good faith should be implied. The contractual documentation was “extensive and detailed” and the parties were at arm’s length with one another. It was unlikely that they omitted to insert an important term. That the parties had evidently considered protecting the claimants but had not included a duty of good faith suggested that no such duty was intended.

The court noted that the power in this case was akin to the discretion vested in the claimant Trust in the *Mid Essex* case (referred to above). It was, in effect, a binary choice as to whether or not to exercise an absolute contractual right. The fact that the defendant had that contractual choice did not justify subjecting it to some kind of good faith obligation.

8. NEGOTIATIONS

The starting point is that a bare agreement to negotiate is unenforceable in English law. It is likely to be, in essence, an “agreement to agree”, which is too uncertain to form a binding contract. A duty to negotiate in good faith is also seen as unworkable because it is inherently incompatible with the adversarial position of a negotiating party. Enforcement is also problematic, as it is likely to be unclear whether negotiations have broken down because of a breach, and what the outcome would otherwise have been.

However, recent cases suggest the courts may take a more liberal approach where parties have agreed such an obligation as part of a professionally drafted commercial contract, and where its content is subject to objective criteria.

In *Petromec v Petroleo Brasileiro* [2005] EWCA Civ 891, the Court of Appeal enforced an obligation to negotiate in good faith the extra costs of upgrading a vessel in accordance with an amended specification. If the parties could not reach agreement, the court could itself determine the reasonable costs; this was a matter that was capable of objective assessment.

The courts have also taken a more liberal approach in enforcing dispute resolution clauses: in *Emirates Trading v Prime Mineral Exports* [2014] EWHC 2104 (Comm), it was held that a clause requiring the parties to seek to resolve a dispute by friendly discussions, within a time limited period, constituted an enforceable condition precedent to arbitration.

Note that some legal systems may impose duties to act in good faith in negotiating contracts, which may apply if there is some connection with the jurisdiction in question (eg if negotiations are held there), even if the contract is ultimately governed by English law.

In *Shaker v Vistajet* [2012] EWHC 1329 (Comm) (see [post](#)), Mr Shaker sought the return of a US\$3.55 million deposit paid pursuant to a Letter of Intent concerning the purchase and operation of an aircraft. It was accepted that the Letter of Intent was intended to be binding in respect of certain matters including the payment and refund of the deposit.

The Letter of Intent provided for the return of the deposit where “despite the exercise of good faith and reasonable endeavours” the parties failed to agree and execute the relevant transaction documents before a specified cut-off date. Vistajet argued that Mr Shaker was not entitled to the return of his deposit as he did not proceed in good faith or use reasonable endeavours to agree the relevant transaction documents.

The court held that, if the requirement to negotiate in good faith was a condition precedent to the return of the deposit, it was unenforceable. The position was different in *Petromec* because there were objective criteria to assess the relevant matters in the absence of agreement. Where, as here, there were no objective criteria, the court could not enforce the parties’ agreement to agree and so the deposit was repayable.

“An obligation to negotiate in good faith is unlikely to be binding unless it is subject to clear time constraints and/or objective criteria the court can apply to fill in the gap if there is no agreement.”

9. TERMINATION

Good faith principles may have some relevance to an innocent party’s decision to affirm or terminate a contract following a counterparty’s repudiatory breach, even if the courts are reluctant to apply such a constraint to an express right to terminate (as in *TSG*, referred to above).

It has long been accepted that the innocent party cannot affirm the contract unless it has a “legitimate interest” in performing and claiming the contract price rather than claiming damages. That has traditionally been interpreted as setting a fairly low threshold, breached only if: (a) damages would be an adequate remedy; and (b) maintaining the contract would be wholly unreasonable.

In *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), however, the High Court (Leggatt J, who also decided the *Yam Seng* case referred to earlier) suggested that an innocent party’s decision whether to terminate or affirm the contract must be exercised in good faith (see [post](#)).

The scope of the decision is not entirely clear, but Leggatt J said he could not see any difference of principle between the exercise of a contractual discretion, which is subject to implied duties of good faith, and a choice whether or not to terminate in response to a repudiatory breach. In each case one party has a decision to make on a matter which affects the interests of the other. There is therefore the same reason to imply some constraint on the decision-maker’s freedom to act purely in its own self-interest. Note, however, that an appeal against the decision is expected to be heard in May this year.

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